30th Congress, 1st Session. [SENATE.] Rep. Com. No. 43.

IN SENATE OF THE UNITED STATES.

January 24, 1848.

Submitted, and ordered to be printed.

Mr. Felch made the following

REPORT:

[To accompany bill S. No. 102.]

The Committee on Public Lands, to whom were referred the petition of John Millikin, and others, have had the same, together with the accompanying documents, under consideration, and respectfully submit the following report:

The petitioners show that they are severally the owners of certain front or river lots, situated in township 17 north of range 13 east, and in township 16 north of range 14 east, in the Ouachita land district, in the State of Louisiana, which front on the Mississippi river, and they claim a pre-emption right to the lands in the rear of their several lots by virtue of the provisions of an act of Congress of the 15th June, 1832, entitled "An act to authorize the inhabitants of the State of Louisiana to enter the back lands," and an act supplementary thereto of the 24th February, 1835. The act first above mentioned secured to every person therein described, who owned a tract of land bordering upon any river, creek, bayou, or watercouse, not exceeding in depth forty arpents, French measure, "a preference in becoming the purchaser of any vacant tract of land adjacent to, and back of, his own tract, not exceeding forty arpents, French measure, in depth, nor in quantity of land, that which is contained in his own tract, at the same price, and on the same terms and conditions, as are or may be provided by law for the other public lands of said State." A further restriction is placed upon the pre-emption right by a provision contained in the act, that it "shall not extend so far in depth as to include lands fit for cultivation, bordering on another river, creek, bayou, or watercourse;" and every person entitled to the benefit of the act is required to deliver to the register of the proper land office, a notice in writing of the situation and extent of the tract he wishes to purchase, and to make payment of the purchase money therefor, within three years from the date of the act—the time of delivering such notice to be considered the date of his purchase, and a failure to deliver such notice, and to make such payment within three years, to operate as a forfeiture of the pre-emption right. In case of such

forfeiture, the land is to be sold to any other person in the same manner as other public lands. By the supplemental act of February 24th, 1835, the time of pre-emption is extended to the 15th June, 1836.

The act first above mentioned establishes a different rule as to the time of purchase by the pre-emptor, in case of lands which should be offered for public sale after the date of the law; but, as one of the townships in which the lands in question are located was offered for sale in 1826, and the other in 1829, both before the date of the law, this provision is inapplicable to the case of the petitioners.

It is evident from a careful examination of this act, that from the time of its passage until the 15th June, 1836, the back lands therein described were withdrawn from general sales, and the right to purchase given exclusively to the owners of the front lots. Sales to third persons were unauthorized, and, if made, were without authority. This construction is fully recognized in instructions from the general land office, upon the subject of pre-emption rights under the law, in which it is declared, that "no sales of any tract can or could be legally made, after the date of the act, to any other person than the owner of the front tract."

While the right to enter the back lands was perfect and exclusive under this law, the petitioners, as is proved by them, gave the necessary notice, and tendered the purchase money for the lands in question at the proper office. This tender was refused, and the claim of a pre-emption right rejected.

One reason given at the local land office, for refusing the entries applied for by the petitioners, was, that the lands had been purchased by other persons, at private sale, after the passage of the law of the 15th June, 1832, and previous to the tender of the price by the applicants. If the lands were within the description given in the act of Congress, we have before seen that such sales to third persons was unauthorized, and the patents issued therefor should be declared null and void. The rights of the pre-emptioners could not thus be set aside by the unauthorized entries by third persons.

As a further reason, both in justification of the sales made to third persons and in denial of the petitioners' right to pre-emption, it was alleged that the lands in question were excluded from the operation of the law, by virtue of the proviso contained therein, which declares that the right to pre-emption should not include "lands fit for cultivation bordering on another river, creek, bayou, or watercourse."

From an examination of such plats and documents as have been laid before the committee, they are constrained to believe that no such objection existed in fact, or in law, to the exclusive right of the petitioners to purchase the lands. On this subject the following language, contained in the report of a committee of the Senate who investigated the matter in 1844, is quoted with approbation.

"The law contemplates, not only that the tract to be excepted from its operation should *border* upon some other watercourse, but that it should also be fit for cultivation. Both of these facts must

be established, to make the proviso effective. The existence of neither, separate from the other, will meet the requirement of the law. The fact that the lands applied for, were fit for cultivation, is not in proof, and the committee have had to confine their examination to the other clause of the restriction contained in the proviso, to wit: whether the application embraced lands 'bordering on another river, creek, bayou, or watercourse.' In considering this clause, the committee have supposed the legislature had in view and contemplation the common and familiar meaning of the word *border*, as applicable to the manner in which the tracts were represented on the official plats of survey; and that, therefore, the proviso was intended to relate only to such tracts as, by those plats, were represented as bordering upon some watercourse; or, in other words, that some watercourse must be represented as forming the confines or extreme limit, the outer edge or border of the same tract, which could be sold separate and distinct from any other tract. To suppose the law intended to exclude from its operation every tract through which any stream, no matter how insignificant, might pass, and the bed of which was included within, and sold as a part of, the ordinary subdivisions of the public lands, would be to render the law itself almost nugatory, so numerous are the small drains and watercourses in the section of country to which the operation of this law is confined.

In the examination of this subject, and with a view to a proper understanding thereof, the committee have inspected the official plats of the surveys of these townships; and although, so far as some of these back pre-emptions are concerned, it is apparent they will cross some minute drains or watercourses, it is equally evident, that in no case would the claims of the pre-emptioners embrace any tract of land which by the plats is bordered by any river, creek, bayou, or watercourse; and in this opinion they are fully sustained by that of the Solicitor of the Land Office upon these cases. He says 'that, with one exception, hereafter to be named, no river, creek, bayou, or watercourse, described in the first proviso of said act, exists as an obstacle to the entry of these back lands; that in township 16, range 14 east, a bayou is represented as existing in the rear of lots 1, 2, 3, and 4, designated as Walnut bayou; that the quality of all these lands, as fit for cultivation, as well as the permanent existence of the bayou in question, are matters of doubt. But however these last facts may be, and for the present purpose admitting them as proved, it remains to be stated, that Walnut bayou is not of the character contemplated by the act, forming the border or exterior limit of any of the lands the claim to which is here contested.'

The committee will further remark, in relation to the interfering sales in township 16, of range 14 east, that the plats in the General Land Office show that only the river or front lots were surveyed in the fall of 1828, and the plat thereof, certified by the surveyor general on the 27th of April, 1829, represents the back lands as unsurveyed 'low swamp, unfit for cultivation,' while the plat certified by the surveyor general the 11th of April, 1831, states the back

lands to have been surveyed in February and March, 1831; and as the only proclamation that has ever been issued for the sale of the lands in this township was the one dated the 16th of July, 1829, directing the offering to take place in November, 1829, it is apparent the private entries which have been made of these back lands are illegal; for the lands could not have been legally offered before they were surveyed."

The petitioners ask the right of completing their purchases as of the day when they filed their notices and tendered the purchase money, and that patents may be directed to issue to them. If this course should be taken, two patents for the same premises, issued from the same office to different individuals, would be outstanding. It is not necessary here to determine what, in that event, would be the legal position of the adverse claimants under their evidences of title. Where a patent has illegally or improvidently been issued to one individual, while the right to purchase the premises is exclusively in another, it is believed that neither the practice of the public offices, nor a due regard to the rights of individuals or of the public, would sanction the issuing of a second patent while the first was outstanding and uncancelled. The proper course to be pursued in such case is pointed out by the Attorney General in an opinion which will be found in the Land Laws, part 2, page 16. The patents should be returned by the patentee to the office for cancellation; but, if this is refused, proceedings should be commenced to procure their repeal by *scire facias*, or by bill on the chancery side of the court of the United States within whose jurisdiction the lands lie, which proceedings may be instituted by the United States, in their own name, or the pre-emptioners may be authorized to use the name of the United States for this purpose. Upon such proceedings, the legal questions involved in the case would receive a proper examination and determination, and, if the lands were not subject to entry by the patentees, the patent may be annulled and the impediment to the entry by the petitioners be removed.

In accordance with these views of the rights of parties and the proper method of securing them, the committee present the bill herewith reported.